IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2006

STATE OF TENNESSEE v. JESSICA HOPE LANE

Direct Appeal from the Criminal Court for Sullivan County
Nos. S48,448; S49,240; S49,862 Phyllis H. Miller, Judge

No. E2005-01408-CCA-R3-CD Filed April 7, 2006

The defendant, Jessica Hope Lane, pled guilty to possession of cocaine with intent to sell, theft of property valued under $500.00, possession of drug paraphernalia, obtaining a controlled substance by fraud, and two counts of failure to appear. In return, the defendant received a five-year sentence to be served in a manner determined by the trial court plus two years on probation resulting in an effective seven-year sentence. The trial court ordered the defendant to serve her five-year sentence in confinement, and the defendant appealed. Following our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Keith A. Hopson, Kingsport, Tennessee, for the appellant, Jessica Hope Lane.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Teresa Murray Smith and William Harper, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The defendant was indicted in case number S48,448 for possession of cocaine with intent to sell, theft of property valued under $500.00, and two counts of possession of drug paraphernalia. The defendant was also indicted in case number S49,240 for obtaining a controlled substance by fraud. Two presentments, numbered S49,861 and S49,862, were subsequently issued for failure to appear. After negotiations with the state, the defendant pled guilty to possession of cocaine with intent to deliver under 0.5 grams for a three-year sentence, theft of property valued under $500.00

for an eleven month and twenty-nine day sentence, and one count of possession of drug paraphernalia for an eleven month and twenty-nine day sentence as reflected in indictment S48,448. The defendant also pled guilty to failure to appear for a one-year sentence on supervised probation as reflected in indictment S49,861. The defendant pled guilty to obtaining a schedule IV controlled substance by fraud for a two-year sentence as reflected in indictment S49,240. Finally, the defendant pled guilty to failure to appear for a one-year sentence on supervised probation as reflected in indictment S49,862.

The facts underlying these cases presented by the state at the guilty plea hearing were as follows:

> [P]roof in [indictment] S48,448 would be that in May of 2003 Ms Pearl Meade reported to the Kingsport Police that her purse had been stolen. Ms Meade is Ms Lane's grandmother. She lived on Virgil Street in the City of Kingsport, Sullivan County. She advised that her granddaughter, Jessica, had taken her purse from her residence, she had chased after her until she got into a car that was driven by Samara Johnson, who is also charged. Ms Meade told the police that she had jewelry and over $300.00 in cash and also had a quantity of medication. Ms Meade cares for Ms Lane's mother, who is Ms Meade's daughter who is, or was at that time very ill. Included in the medication were Valium, Loratab and various other controlled substances. Also there were important legal documents to Ms Meade such as deeds and wills and items that she had kept in her purse.
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> . . . .
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> After that was reported to the police[,] Officer Burt Murray with the Kingsport Police Department began looking for ---- Ms Meade had told Officer Murray she thought her granddaughter was staying at the Kingsport Inn on Lynn Garden Drive. He went there to the residence, found the car that was described by Ms Meade, Ms Johnson's car in the parking lot, found Ms Lane and Ms Johnson in a room along with Nicholas Rindeau, [who] has been charged in this offense and has pled and is awaiting sentencing. They were placed under arrest. Ms Lane, after being advised of her rights, gave a statement and admitted she did take her grandmother's purse and that she took the medication from it along with the money and other things and they threw the purse in a dumpster behind the Food Lion in Lynn Garden. The purse was located but several of the items were not found, including the legal documents.
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> All about that motel room were quantities of drug paraphernalia and crack cocaine in Ms Johnson's backpack that she had left there [when] she had taken Ms Lane over to the grandmother's house to take the purse and then return. There was found cocaine, other stolen property. The cocaine was analyzed by the crime lab by Denise Buckner and found to be over half a gram of cocaine but we have agreed to this compromised plea of less than half a gram. All that resulted in the charge being

placed and then was ultimately brought to this court in which Ms Meade . . . testified at the preliminary hearing but is reluctant to testify against her granddaughter.

Subsequently to it being here in court on September 17th of last year when it was set for announcement Ms Lane failed to appear for an announcement date on that charge resulting in the failure to appear charge in Case S49,861.

Then in November of 2003 on the 23rd in Case S49,240 Ms Lane attempted to have a prescription filled at WalGreen's Pharmacy on West Stone Drive in Kingsport in the city limits in Sullivan County. The prescription belonged to Teresa Ray and was for Clonapin, which is a Schedule IV controlled substance. The pharmacy refused to fill the prescription because of the discrepancies in identity. It was subsequently learned that on that same day Ms Ray's car had been burglarized at Bojangle's Restaurant on West Stone Drive and her purse taken. The prescription had been in her purse. Ms Lane has subsequently pled guilty to the theft of that purse in the General Sessions Court.

She was identified in addition to, by the pharmacy personnel by a photo lineup shown by police to them after receiving her description as being the person who attempted to fill that prescription. That charge was heard in General Sessions Court and bound over to this court and she was present in July and it was reset for an announcement date on, again, September 17th, 2004 and she failed to appear and that resulted in the charges of S49,862.

The trial court accepted the defendant's pleas and set a sentencing hearing to determine the manner of service of the sentence.

At the sentencing hearing, the defendant testified that prior to her incarceration she and her mother lived with her grandmother, one of the victims, but if released she would live with her aunt, Carolyn Woods. She stated that her mother had been in a vegetative state for eleven years and she helped care for her mother. The defendant explained that if she were released from jail she had a secretarial job lined up at an auto shop. The defendant admitted that she had a drug addiction and a lengthy criminal history, but she reiterated that she wanted to get help fighting the addiction. She testified that being incarcerated had made her realize that she had hurt not only herself but other people. She indicated that she was willing to take random drug tests and go through counseling, as well as stay away from her co-defendant and others who used illegal drugs.

On cross-examination, the state questioned the defendant about how she supported herself considering her only work history was working as a waitress for two weeks. The defendant responded that she "basically stay[ed] at home and help[ed] with [her] mother," and her grandmother gave her money. She claimed that she supported her two-hundred dollar a day drug habit with money from her friends or her grandmother or "just whoever [she] could get the money from." The defendant, however, repeatedly refused to give out the names of her drug sources, other than "a lot

of people in general around town." In response to questions about Mr. Gervin, the auto shop owner, she said that they had gone on a couple of dates and he was aware of her criminal background. The defendant also admitted that she had failed to comply with the conditions of her probation on charges from 2001. She explained, however, that she was strung out on drugs then, but things would be different now because she has had time to realize what she has done.

Carolyn Woods testified on the defendant's behalf. Ms. Woods testified that she had a close relationship with her niece, the defendant. Ms. Woods explained that at one time she lived with the defendant and the defendant's mother to help take care of the defendant's mother. According to Ms. Woods, the defendant assisted with the care of the defendant's mother. Ms. Woods lastly expressed her willingness to allow the defendant to live in her home if she were released into the community.

The pre-sentence report was introduced into evidence at the sentencing hearing. The report revealed that the defendant had six convictions for theft and two traffic offenses. The report also indicated that the defendant quit attending school during her freshman year of high school, committed the offense of obtaining a controlled substance by fraud while out on bond, had an extensive history of illegal drug use, and owed almost $5,000.00 in court costs. Additionally, the report indicated that the defendant reported being depressed due to her mother and grandmother's health problems and her own incarceration.

After hearing the testimony and reviewing the pre-sentence report, the trial court ordered the defendant serve her sentence in confinement. The defendant appealed.

ANALYSIS

In this appeal, the defendant challenges her sentence of confinement. Specifically, she argues that she should have been granted probation or some form of alternative sentencing because none of the principles upon which confinement should be based apply to her. The defendant contends that the trial court should have considered her drug addiction as an excuse or justification for her conduct; should have considered her potential for rehabilitation; and should have given more weight to the mitigating factor that her conduct did not cause or threaten serious bodily injury.

This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

In conducting our de novo review of a sentence, this court must consider (a) the evidence adduced at trial and the sentence hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

Generally, considerations relevant to determining a defendant's eligibility for alternative sentencing are relevant to determining suitability for probation. *See Ashby*, 823 S.W.2d at 169. A defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). However, this presumption is unavailable to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, and has failed past efforts at rehabilitation. *Id.* § 40-35-102(5); *State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Also, the presumption in favor of alternative sentencing may be overcome by facts contained in the pre-sentence report, evidence presented by the state, the testimony of the accused or a defense witness, or any other source, provided it is made a part of the record. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

Tennessee Code Annotated section 40-35-103 provides guidance as to whether the trial court should grant alternative sentencing or sentence the defendant to total confinement. Sentences involving confinement should be based upon the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .
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> . . . .
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> (5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. . . .

Tenn. Code Ann. § 40-35-103(1), -(5). The trial court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 as they are relevant to the section 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996).

A defendant is eligible for probation if the actual sentence imposed is eight years or less and the offense for which the defendant is sentenced is not specifically excluded by statute.[1] *See* Tenn. Code Ann. § 40-35-303(a). A trial court shall automatically consider probation as a sentencing alternative for eligible defendants. *Id.* § 40-35-303(b). However, entitlement to probation is not automatic and the defendant still bears the burden of proving suitability for full probation. *Id.*, Sentencing Commission Comments; *State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). Among the factors applicable to a probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. *See State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978). Notably, the nature and circumstances of the offense may on occasion be so egregious as to preclude the grant of probation. *See State v. Poe*, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981).

After the sentencing hearing, the trial court concluded:

> [T]he Court's required to consider enhancement and mitigating factors, the nature and circumstances of the offense, all the information in your presentence report. You're presumed to be a favorable candidate for alternative sentencing merely because you pled to, as a Range I standard offender for offenses less than a B Felony.
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> Now, enhancing factors that apply, one does not. Two applies; you have a previous history of criminal convictions and criminal behavior in addition to those necessary to establish the appropriate range. Criminal convictions are set out in your presentence report. The criminal behavior is illegal drug use, extensive illegal drug use.
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> Number three, I find that you were a leader in the commission of an offense involving two or more criminal actors as far as the theft from your grandmother. The other one just helped you get away, apparently.
>
> . . . [Y]ou have a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. That's set out in the [presentence] report. Two occasions you had violations filed against you, on at least one it was revoked. February 26th, 2004[,] you got 11/29 suspended for theft under $500.00. . . . [I]t's set out in the presentence report . . . the two [violations] that were filed against you.
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> . . . [S]ixteen, you abused a position of private trust, that was your grandmother; you were living in her house. She was allowing you to live there to help take care of your mother, so I find that as far as the stealing her drugs, her

[1] The statute has changed so that a defendant is eligible for probation if the actual sentence imposed is *ten* years or less. However, the offenses at issue occurred before the change in the statute. *See* Tenn. Code Ann. § 40-35-303(a) (Supp. 2005).

medications and her pocketbook and all of that, that was a violation of private trust. . . .

Mitigating factors, number one, criminal conduct neither caused nor threatened serious bodily injury, if that applies I give it very, very little weight.

Two, you didn't act under strong provocation.

Three, substantial grounds do not exist tending to excuse or justify your criminal conduct.

Four, you didn't play a minor role.

Five, before detection you didn't compensate the victim.

Six, you're 23 years-old, got a lengthy criminal history already, so that doesn't apply.

Seven, you weren't motivated by a desire to provide necessities for yourself or your family. Your grandmother was doing that, actually.

Eight, you weren't suffering from a mental or physical condition that significantly reduced culpability.

Nine, you didn't assist the authorities in uncovering offenses committed by others.

Ten, you didn't assist the authorities in recovering any property or person involved in this crime.

Eleven, yes, you had a sustained intent to violate the law. I think you'd been staying at this motel . . . stayed there the night before at a motel where you were found . . . and apparently left there to go steal from your grandmother. But anyway, it wasn't an impulsive crime. . . .

Twelve, you didn't act under duress or domination of [another] person.

Non-statutory mitigators, lack of criminal record doesn't apply.

Genuine sincere remorse, well I don't think so. Somewhere in here I saw you got 110 days in jail one other time, so you know, you're long past realizing how many people you've hurt and all of that, so I really don't find any remorse. You didn't cooperate with the officers.

Excellent work history, no.

Self-rehabilitative efforts, years ago and then you left ---- well, they released you and then you didn't go back for the outpatient treatment.

Voluntary confession of guilt, well it says you weren't cooperative, so I don't know. Ms Johnson was the one telling them you threw the purse and everything in it [into] the dumpster, but I think they found . . . part of the pills on you, at the jail or when they took you into custody.

Honorable discharge from military service, no.

You have a poor educational history. Let's see, dropped out in the 8[th] grade. Extensive drug use, like I said before, poor work history, poor criminal history. Alternative sentencing has been tried and I guess now you're serving the rest of your 11 month [and] 29 day sentence in Case No. X62794 . . . ?

. . . .

You're ordered to serve your sentence of five years as a Range I standard offender in the Tennessee Department of Corrections. That is consecutive to General Sessions Court Case No. X62794. Okay, and you know, release in the community has been tried and failed on previous occasions, so it's time to serve your sentence . . . .

Following our review, we conclude the trial court did not err in denying the defendant's request for probation or alternative sentencing. The transcript of the sentencing hearing includes the trial court's extensive analysis and reasoning, and in our view, the record fully supports the sentence of confinement. The pre-sentence report reveals that the defendant has a substantial criminal history including at least six thefts. Additionally, the report reveals that prior attempts to rehabilitate the defendant in the community have failed. Specifically, the defendant violated her probation on a November 2003 offense and is currently serving the remainder of that sentence in jail. Plus, it appears that she had another violation of probation filed against her in May 2003, although the ultimate disposition of that complaint is unknown. Furthermore, the pre-sentence report indicates that the defendant committed the felony of obtaining a controlled substance by fraud while out on bond from the changes in indictment S48,448.

In contrast, the defendant has failed to offer support for her contentions that the trial court should have considered her drug addiction as an excuse or justification and should have given more weight to the factor that her conduct did not cause or threaten serious bodily harm. Also, contrary to the defendant's assertion, the record reveals that the trial court did address her potential for rehabilitation in noting that she previously failed to finish an outpatient treatment program. Further

contrary to the defendant's assertions, our review of the record shows a sufficient principle upon which to base confinement; namely, that measures less restrictive have been tried and failed before. Accordingly, in light of the defendant's burden of proof on appeal, we conclude the defendant has not met her burden of proving the trial court erred in sentencing her to confinement. Thus, the judgment of the trial court is affirmed.

CONCLUSION

Following review, we affirm the judgment of the trial court ordering the defendant serve her sentence in confinement.

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J.C. McLIN, JUDGE